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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER HERNANDEZ, Defendant and Appellant.	B210439 (Los Angeles County Super. Ct. No. LA054405)

APPEAL from a judgment of the Superior Court of Los Angeles County, Martin L. Herscovitz, Judge. Modified with directions and, as so modified, affirmed.

Linda Acaldo, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Yun K. Lee and Laura J. Hartquist, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Christopher Hernandez appeals from the judgment entered following a jury trial that resulted in his convictions for attempting to dissuade a witness, attempted murder, and making criminal threats, all for the benefit of a criminal street gang. Hernandez was sentenced to 35 years plus life in prison.

Hernandez contends the trial court erred by admitting evidence of his prior arrests, and committed instructional error. The People request that the abstract of judgment be corrected to comply with the trial court's oral pronouncement of judgment. We correct the abstract of judgment as requested, and in all other respects affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

a. *People's evidence.*

(i) *Crimes against Gabriela Ochoa.*

On April 21, 2006, Gabriela Ochoa witnessed a murder on Calvert Street in Los Angeles, near her residence. She identified the shooter, Romero Munoz, to police. Munoz was a member of the Barrio Van Nuys criminal street gang, with the moniker " 'Criminal.' " Appellant Hernandez, along with his three brothers, were also members of the gang, and Hernandez had dated Munoz's sister, Veronica.

On December 25, 2006, Gabriela was celebrating Christmas with her family and friends at her Calvert Street apartment in Van Nuys. Her brother, David Ochoa, went outside to make a cellular telephone call. While he was doing so, co-defendant Robert Nunez, a Barrio Van Nuys gang member, approached and asked about David's brother, Rubin, and Rubin's girlfriend, Lily. David stated he did not know where they were, and asked who Nunez was. Nunez gave his name as " 'Sleepy' " and asked, " 'Where is Gaby?' " Nunez departed, and Ochoa continued his telephone conversation.

Nunez returned with a gun. Ochoa, frightened, headed toward the apartment. Hernandez joined Nunez and the two men began whispering. Ochoa reached the apartment door and told Gabriela's husband, Eduardo, what was happening. Eduardo told Gabriela, who became very frightened. David entered the apartment. Gabriela peered out the front window and called police. Nunez, accompanied by Hernandez,

approached the apartment. Both Nunez and Hernandez were armed with guns. Nunez aimed a black handgun at the apartment window and he and Hernandez repeatedly yelled, " 'bitch,' " and " 'Rata,' " which meant " 'snitch.' " Gabriela called police. Minutes later, she observed Nunez fighting with a man near a red car.

(ii) *Crimes against Manuel Acevedo.*

The same evening, December 25, 2006, Manuel Acevedo was visiting his girlfriend at her residence on Calvert Street, near Gabriela's apartment. At approximately 8:00 p.m., he placed some chocolates in his car. As he crossed the street to return to his girlfriend's apartment, Nunez approached, placed a gun against Acevedo's rib cage, and demanded, " 'Give me your keys, mother fucker.' " When Acevedo asked what was going on, Nunez repeated, " 'Give me your keys, mother fucker, or I'm going to kill you.' " Acevedo was frightened. He told Nunez to remain calm and placed his hand in his pocket to retrieve his car keys. While Nunez was distracted, Acevedo grabbed the gun and punched Nunez, causing Nunez to fall to the ground and release the gun. Acevedo removed the gun's magazine and kicked the magazine under a car. Acevedo then fired the gun toward the ground to be sure no bullets were in the chamber. Meanwhile, Nunez grabbed Acevedo and punched him in the stomach. Acevedo struck Nunez in the head with the bottom of the gun. Nunez fell to the ground, but grabbed Acevedo around the waist. Acevedo hit Nunez in the head with the gun twice more.

Hernandez ran toward the struggling pair. Acevedo threw the gun on the ground and made a run for his girlfriend's apartment, but slipped and fell on the stairs. Hernandez caught up with Acevedo, pointed a gun at Acevedo's chest, and pulled the trigger twice. The gun made a clicking sound, but did not fire. Nunez approached and handed Hernandez the magazine that Acevedo had previously removed. While Hernandez was attempting to replace the magazine in the gun, Acevedo ran into his girlfriend's apartment.

(iii) *Arrest and investigation.*

Hernandez and Nunez fled. They were pursued and apprehended by police. Nunez was bleeding from his head where Acevedo had struck him. An officer recovered

a loaded handgun from a nearby bush along the route where the two men had run. DNA testing confirmed that blood found on the gun belonged to Nunez.

Gabriela identified Nunez and Hernandez in a pretrial photographic lineup, at the preliminary hearing, and at trial, despite threats made by a Barrio Van Nuys member that her daughters would be killed if she testified. Acevedo identified both men in a field showup and at trial.

The People additionally presented evidence establishing the Penal Code section 186.22[1] gang enhancement.[2]

b. *Defense evidence.*

Hernandez put on evidence related to the threats made to Gabriela. Additionally, Francisco Jaurgui testified for the defense that Hernandez had Christmas dinner with him on the night of December 25, 2006, at Jaurgui's residence on Calvert Street. Hernandez went outside to make a telephone call. Jaurgui also went outside and observed police on the street. He then "lost track" of Hernandez's whereabouts.

Nunez testified in his own behalf, as follows. On December 25, 2006, he was celebrating Christmas with his family. He became drunk. A friend arrived and offered him drugs. The friend pulled out a gun, stating he had found it in a trash can behind his house. The friend proposed that if Nunez could sell the gun, they would split the proceeds. Nunez walked over to Calvert Street, to the home of Rubin, with whom he used to drink. He saw David, showed him the gun, and asked him to inquire whether Rubin and Lily would like to purchase it when they arrived home. Nunez then observed Acevedo. Mistakenly thinking Acevedo was an acquaintance, Nunez approached Acevedo with the gun and asked if he wished to purchase it. Acevedo misunderstood his intent and began punching him. Hernandez, believing that Nunez was being attacked, went to Nunez's aid. Nunez did not know Hernandez. Nunez was not a gang member

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1 All further undesignated statutory references are to the Penal Code.

2 Because the sufficiency of the evidence related to the gang enhancement is not at issue, we do not detail it here.

and both the incident involving David and the incident involving Acevedo were misunderstandings.

2. *Procedure.*

Hernandez and Nunez were tried together by a jury. Hernandez was convicted of attempting to dissuade a witness (§ 136.1, subd. (a)(2)), attempted murder (§§ 664, 187, subd. (a)), and making criminal threats (§ 422). The jury found the offenses were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)); a principal was armed with a firearm during commission of the offenses (§ 12022, subd. (a)(1)); and Hernandez personally used a firearm during commission of the attempted murder (§ 12022.53, subd. (b)).[3] After a bench trial on various prior conviction allegations, the trial court found Hernandez had suffered two "strike" convictions (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). It denied Hernandez's *Romero* motion[4] and sentenced him to a term of 35 years plus life in prison. It imposed a restitution fine, a suspended parole restitution fine, and three court security fees. Hernandez appeals.

DISCUSSION

1. *Admission of testimony regarding Hernandez's prior arrests.*

Hernandez contends that the trial court erred by admitting evidence regarding two of his prior arrests. We disagree.

a. *Additional facts.*

The People called several police officers as witnesses in their case-in-chief. Prior to the officers' testimony, during a sidebar discussion out of the presence of the jury, the prosecutor cautioned that he did not intend to elicit information from the officers regarding prior arrests of Hernandez or Nunez. He explained that the defendants had been "taken into custody a lot of times. They were arrested for various things. [¶] . . .

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[3] The jury deadlocked on the question of whether the attempted murder was willful, deliberate, and premeditated, and the trial court declared a mistrial in regard to that allegation.

[4] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

I'm not intending to open the door regarding any priors that are not being used in any way; but I want to warn counsel or advise counsel—and I think it's all in the discovery—that Mr. Hernandez has had several contacts where he's been arrested. He's been taken to juvenile court by a lot of the officers who are going to testify. . . . [¶] If we get into an area where [defense counsel] start[s] asking [the officers], 'how long have you known [the defendants],' and that kind of thing, it gets to the point where they know him every time he's out of custody . . . . These guys were bouncing in and out of custody between 2002 and the present date." The trial court stated that it was confident defense counsel would "be circumspect in choosing what questions to ask or not ask."

(i) *Testimony by Officer Smith.*

The People then called Los Angeles Police Department (L.A.P.D.) Officer Anthony Smith. The prosecutor asked about Smith's contacts with Hernandez and his family, eliciting the following evidence. Hernandez had admitted, during consensual encounters with Smith, that he was a Barrio Van Nuys gang member. Hernandez's attire and associates also indicated his gang membership. Hernandez's older brother, Patrick Kelly, was a "hard-core" Barrio Van Nuys gang member and had been prosecuted for murder. Hernandez began to "claim" membership in the gang after Kelly's murder trial. Hernandez's twin brother and another brother were also Barrio Van Nuys gang members. Defense counsel objected at one point that the prosecutor's questions were leading. At sidebar, the prosecutor explained: "[A]s I indicated to the court before we started, I'm . . . trying to steer clear of areas that I don't want to get into with this witness that would possibly be prejudicial or objectionable to the . . . defense. So I'm doing my best . . . to avoid those areas."

Hernandez's counsel cross-examined Smith and elicited that most of Officer Smith's conversations with Hernandez and his family members had been consensual and did not involve arrests.[5] She also elicited that Smith had prepared field identification

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[5] The relevant testimony was as follows: "[Defense counsel:] You've known the entire Hernandez family. Is that correct? [¶] [Smith:] I wouldn't say the entire

cards on Hernandez, but had not brought them to court, despite the fact Smith was aware he would be testifying. Defense counsel subsequently engaged in the following line of inquiry:

"[Defense counsel:] Do you know of any injunction that's against Christopher Hernandez? Only if you know. Yes or no.

"[Smith:] If you could specify what kind of injunction you mean.

"[Defense counsel:] An injunction that prevents him from traveling outside of where he lives to one or two blocks from where he lives, or more.

"[Smith:] Yes, ma'am, I do.

"[Defense counsel:] You know for a fact there's an injunction?

"[Smith:] There was a court order, specific condition of his probation, not to associate in Barrio Van Nuys locations.

"[Defense counsel:] And were you part of that probation?

"[Smith:] I don't know what you mean by that, ma'am.

"[Defense counsel:] Were you involved in any way in his probation?

"[Smith:] Do you mean in enforcing his probation? I don't understand what you mean.

"[Defense counsel:] Yes, enforcing his probation.

Hernandez family; but the father, I've had several contacts with, because he lives out here locally. The aunt, I've had several contacts with. The older brother, I've had several contacts with. Christopher and his twin brother Steven, I've had a lot of contacts with. His little brother, as well. [¶] [Defense counsel:] And you said most of these conversations you've had have been just that? Conversations? Is that a fair statement? [¶] [Smith:] They're – they were not arrests, if that's what you mean. [¶] [Defense counsel:] That's what I'm asking. [¶] [Smith:] Yes, ma'am. [¶] In other words, they were in the course of visiting with him, or seeing him on the street. They weren't in relation to any arrests or any criminal activity. Isn't that correct?" [¶] [Smith:] A lot of the contacts were involved in criminal activity. [¶] [Defense counsel:] But nothing that he did? In other words, you did not arrest him? [¶] [Smith:] That is true. [¶] [Defense counsel:] Then these were conversational in tone. Isn't that correct? [¶] . . . [¶] [Smith:] Yes."

"[Smith:] Absolutely.

"[Defense counsel:] Well, all police officers have the right to enforce probation. I'm asking if you specifically had some doing in regard to his probation. Not specifically, right?

"[Smith:] I'll be honest, ma'am. You're confusing me."

(ii) *Testimony by Officer Tuck.*

The prosecutor next called Officer Jack Tuck and elicited, inter alia, that he had had numerous contacts with Hernandez, and knew him to be a Barrio Van Nuys gang member with the moniker " 'Cuete,' " i.e., handgun. During cross-examination, Hernandez's counsel questioned Tuck regarding how long he had known Hernandez, how he had been introduced to Hernandez, and whether it had been "a friendly introduction." Tuck replied: "Not necessarily, ma'am. He was—my first introduction was during a traffic stop." Defense counsel elicited that Hernandez had been a passenger in a vehicle which had been stopped for a traffic violation. Counsel then asked for the dates when the additional "multiple contacts" between the officer and Hernandez occurred. Tuck replied: "Offhand, I can't give exact dates, ma'am; but I've had numerous occasions where I've talked to him, consensually and during detention." Defense counsel later queried whether the detention occurred when Tuck had filled out a field identification card on Hernandez. Tuck responded: "There were times when I talked to him and he wasn't detained. . . . I didn't even get out of my car. I just saw him standing on the sidewalk, said, 'where are you going?' He told me he was going home. [I] said, 'be safe,' and dr[o]ve away." Defense counsel elicited that although Tuck had completed field identification cards on Hernandez, he had not brought them to court or used them to prepare for his testimony.

(iii) *Testimony by Officer Costello.*

The People next called Officer Todd Costello, who testified as a gang expert. During cross-examination by Hernandez's counsel, the following exchange transpired:

"[Defense counsel:] You made the opinion that Christopher Hernandez is a gang member, and you based that on the – what?

"[Costello:] Numerous contacts I've had with him.

"[Defense counsel:] Numerous contacts. Was that the contacts that you had with Veronica and Mr. Hernandez?

"[Costello:] No. I had several contacts with Mr. Hernandez without Veronica.

"[Defense counsel:] Oh.

"[Costello:] *A couple prior arrests, arresting Mr. Hernandez for – I believe for robbery and also for A.D.W.*

"[Defense counsel:] And you didn't talk about that, did you?

"[Costello:] I wasn't asked that question, ma'am." (Italics added.)

Defense counsel then elicited that there had been more than three contacts between Costello and Hernandez, that Costello filled out field identification cards on Hernandez, but that Costello had not brought the field identification cards to trial.

b. *Discussion.*

Hernandez urges that admission of Officer Costello's testimony that he had arrested Hernandez for robbery and assault with a deadly weapon, italicized above, was reversible error. He complains that Officer Costello provided the information when no question was pending and "[f]or no apparent reason."

Evidence that a defendant committed uncharged misconduct is inadmissible to prove he or she has a bad character or a disposition to commit the charged crime. (Evid. Code, § 1101, subd. (a); *People v. Rogers* (2009) 46 Cal.4th 1136, 1165; *People v. Gutierrez* (2009) 45 Cal.4th 789, 827-829; *People v. Kipp* (1998) 18 Cal.4th 349, 369.) Additionally, under Evidence Code section 352, a trial court may in its discretion exclude material evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time, or create a substantial danger of undue prejudice, confusion of the issues, or misleading the jury. (*People v. Gutierrez, supra,* at pp. 827-828; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314 -1315.)

Here, assuming without deciding that the challenged evidence would have been inadmissible under Evidence Code sections 1101 and 352, reversal is not warranted. First, because counsel did not at any point object to the challenged testimony or request

that it be stricken, the claim has been forfeited on appeal. (Evid. Code, § 353, subd. (a) [a judgment shall not be reversed by reason of erroneous admission of evidence unless "[t]here appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion"]; *People v. Williams* (2008) 43 Cal.4th 584, 626; *People v. Alfaro* (2007) 41 Cal.4th 1277, 1327; *People v. Hinton* (2006) 37 Cal.4th 839, 893; *People v. Martinez* (2001) 88 Cal.App.4th 465, 485-486.)

Second, as the People argue, any error was invited. When information regarding uncharged misconduct is first elicited before the jury by defense counsel, the doctrine of invited error precludes the defendant from arguing on appeal that admission of the evidence was reversible error. (See *People v. Gutierrez* (2002) 28 Cal.4th 1083,1139; *People v. Williams* (2009) 170 Cal.App.4th 587, 620.) Such was the case here. The prosecutor warned the court and defense counsel that Hernandez's numerous prior contacts with police included arrests, and scrupulously avoided eliciting any testimony demonstrating Hernandez had been arrested for, or convicted of, prior crimes. Despite the prosecutor's warning, defense counsel persisted in questioning each officer regarding his prior contacts with Hernandez. In particular, defense counsel asked Officer Costello whether his prior contacts with Hernandez were those involving Veronica Munoz, eliciting the response that the officer had had additional contacts that did not involve Veronica, i.e., the prior arrests. Indeed, defense counsel appears to have made a tactical decision to question each officer regarding his contacts with Hernandez. Counsel attempted to cast doubt on each officer's testimony by demonstrating that, although the officers had had prior contacts with Hernandez and had completed field identification cards regarding him, they had neglected to provide or use those cards at trial. Under these circumstances, the invited error doctrine bars Hernandez's contention. (*People v. Gutierrez, supra,* at p. 1139; *People v. Williams, supra,* at p. 620.)

In any event, assuming the evidence was admitted in error and Hernandez's contention is cognizable on appeal, no prejudice is apparent. The erroneous admission of evidence requires reversal only if it is reasonably probable that appellant would have

obtained a more favorable result had the evidence been excluded. (Evid. Code, § 353, subd. (b); *People v. Richardson* (2008) 43 Cal.4th 959, 1001; *People v. Marks* (2003) 31 Cal.4th 197, 226-227; *People v. Avitia* (2005) 127 Cal.App.4th 185, 194.) No such reasonable probability exists here. Although the jury could conclude from Costello's testimony that Hernandez had previously been arrested, it could not conclude that he had been *convicted* of robbery or assault with a deadly weapon, lessening the prejudicial nature of the evidence. The jury was already aware Hernandez was on probation for some offense, due to defense counsel's questioning of Officer Smith regarding the topic. The People also established, through uncontradicted evidence, that Hernandez was a member of a violent street gang. Thus, the prejudicial nature of Costello's limited and brief testimony was not as significant as Hernandez suggests.

Furthermore, the People's evidence was strong. There was little danger Gabriela misidentified Hernandez, given that she had known him for a few years prior to the crimes. Both Gabriela and Acevedo positively identified Hernandez. Responding officers discovered Hernandez and Nunez running together from the scene, jumping a fence in their path. Nunez had injuries consistent with being hit on the head by Acevedo, and DNA testing determined that blood on the loaded gun found in the bushes was Nunez's. Under these circumstances, there is no probability the jury would have rendered a more favorable result for Hernandez had the challenged portion of Officer Costello's testimony been excised.[6]

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[6] Hernandez also points out that the prosecutor elicited evidence that Hernandez's brothers were "violent, hard-core gang members," and one had been prosecuted for murder, suggesting to the jury that he and his entire family were involved "in an on-going, violent, gang-infested lifestyle." As this claim is not set forth under a separate heading, we do not understand Hernandez to raise it as a separate and distinct claim of error. (See Cal. Rules of Court, rule 8.204(a)(1)(B); *People v. Harper* (2000) 82 Cal.App.4th 1413, 1419, fn. 4.) In any event, Hernandez did not object to the testimony on relevance or Evidence Code section 352 grounds, and has therefore waived any such claim. (Evid. Code, § 353, subd. (a); *People v. Williams, supra,* 43 Cal.4th at p. 626.)

2. *The trial court did not commit instructional error.*

Without objection, the trial court instructed with CALCRIM Nos. 223[7] (direct and circumstantial evidence), 226[8] (witness credibility) and

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[7] CALCRIM No. 223 provided: "Facts may be proved by direct or circumstantial evidence or by a combination of both. Direct evidence can prove a fact by itself. For example, if a witness testifies he saw it raining outside before he came into the courthouse, that testimony is direct evidence that it was raining. Circumstantial evidence also may be called indirect evidence. Circumstantial evidence does not directly prove the fact to be decided, but is evidence of another fact or group of facts from which you may logically and reasonably conclude the truth of the fact in question. For example, if a witness testifies that he saw someone come inside wearing a raincoat covered with drops of water, that testimony is circumstantial evidence because it may support a conclusion that it was raining outside. [¶] Both direct and circumstantial evidence are acceptable types of evidence to prove or disprove the elements of a charge, including intent and mental state and acts necessary to a conviction, and neither is necessarily more reliable than the other. Neither is entitled to any greater weight than the other. You must decide whether a fact in issue has been proved based on all the evidence."

[8] CALCRIM No. 226 provided: "You alone, must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. The testimony of each witness must be judged by the same standard. You must set aside any bias or prejudice you may have, including any based on the witness's disability, gender, race, religion, ethnicity, sexual orientation, gender identity, age, national origin, or socioeconomic status. You may believe all, part, or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe. [¶] In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony. Among the factors that you may consider are: [¶] How well could the witness see, hear, or otherwise perceive the things about which the witness testified? [¶] How well was the witness able to remember and describe what happened? [¶] What was the witness's behavior while testifying? [¶] Did the witness understand the questions and answer them directly? [¶] Was the witness's testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided? [¶] What was the witness's attitude about the case or about testifying? [¶] Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony? [¶] How reasonable is the testimony when you consider all the other evidence in the case? [¶] Did other evidence prove or disprove any fact about which the witness testified? [¶] . . . [¶] Do not automatically

302[9] (evaluating conflicting proof). Hernandez contends these instructions impermissibly lessened the prosecution's burden of proof and were "clearly erroneous," or at least ambiguous.

We disagree. The challenged instructions do not expressly state the propositions that appellant finds objectionable, discussed *post.* The instructions are therefore not clearly erroneous. Instead, Hernandez's argument is that jurors would draw improper inferences from certain portions of the instructions. When reviewing a purportedly ambiguous jury instruction, we ask whether there is a reasonable likelihood the jury has applied the challenged instruction in a way that violates the Constitution. (*People v. Richardson, supra,* 43 Cal.4th at p. 1028; *People v. Crew* (2003) 31 Cal.4th 822, 848; *People v. Smithey* (1999) 20 Cal.4th 936, 963.) " 'In conducting this inquiry, we are mindful that " 'a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.' " [Citations.]' [Citation.]" (*People v. Richardson, supra,* at p. 1028; *People v. Harrison* (2005) 35 Cal.4th 208, 252; *Middleton v. McNeil* (2004) 541 U.S. 433, 437.) " 'Additionally, we must assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.' [Citation.]" (*People v. Richardson, supra*, at p. 1028.)

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reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently. [¶] If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says. Or, if you think the witness lied about some things, but told the truth about others, you may simply accept the part that you think is true and ignore the rest."

9 CALCRIM No. 302, as provided to the jury, stated: "If you determine there is a conflict in the evidence, you must decide what evidence, if any, to believe. Do not simply count the number of witnesses who agree or disagree on a point and accept the testimony of the greater number of witnesses. On the other hand, do not disregard the testimony of any witness without a reason or because of prejudice or a desire to favor one side or the other. What is important is whether the testimony or any other evidence convinces you, not just the number of witnesses who testify about a certain point."

"[N]ot every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation. The question is ' "whether the ailing instruction . . . so infected the entire trial that the resulting conviction violates due process." ' " (*Middleton v. McNeil, supra,* at p. 437.) Applying these principles here, it is clear the challenged instructions are not objectionable.

a. *CALCRIM No. 302.*

Hernandez raises a variety of complaints about CALCRIM No. 302, none persuasive. First, he points to CALCRIM No. 302's statement that, "If you determine there is a conflict in the evidence, you must decide what evidence, if any, to believe." He contends this portion of the instruction incorrectly tells jurors they must "believe" evidence presented by the defense in order to acquit, whereas in fact only the People have any burden of proof. CALCRIM No. 302, however, does not suggest, explicitly or implicitly, that the defendant has the burden of proof to show his innocence or disprove the People's evidence. CALCRIM No. 302 simply states the accurate and unobjectionable proposition that jurors must decide what evidence, " 'if any,' " to believe. (See *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1191.) CALCRIM No. 220, not CALCRIM No. 302, sets forth the People's burden of proof. CALCRIM No. 220 clearly informed the jury that "[a] defendant in a criminal case is presumed to be innocent" and the People must "prove a defendant guilty beyond a reasonable doubt." Reading the instructions as a whole, no reasonable juror would have deduced, from the aforementioned portion of CALCRIM No. 302, that Hernandez had any burden of proof.

Second, appellant urges that CALCRIM No. 302's statement that jurors should not disregard testimony "without a reason" incorrectly creates a presumption that all witnesses are deemed truthful, requiring jurors to credit the People's witnesses. *People v. Ibarra, supra,* 156 Cal.App.4th at p. 1190 and *People v. Anderson* (2007) 152 Cal.App.4th 919, 939 have rejected this contention. "CALCRIM No. 302 does not create a presumption of credibility. It merely cautions the jurors not to disregard testimony on a whim. In this regard, CALCRIM No. 302 is no different from CALJIC No. 2.22, which cautions jurors not to disregard the testimony of the greater number of witnesses 'merely

from caprice, whim or prejudice.' " (*People v. Anderson, supra,* at p. 939.) CALJIC No. 2.22 has been approved by our Supreme Court. (*Ibid.; People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884-885; *People v. Ibarra, supra,* at p. 1190*;* see also *People v. Felix* (2008) 160 Cal.App.4th 849, 858.) Further, Hernandez's argument disregards the fact that CALCRIM No. 226 instructed jurors they alone must determine the credibility or believability of the witnesses, and set forth a variety of factors they might consider when making this determination. (*People v. Anderson, supra,* at p. 939.)

Third, Hernandez posits that the instruction's advice not to " 'favor one side over the other' " was incorrect, because the presumption of innocence requires that jurors "favor" the defense unless the prosecution proves otherwise. He further argues that by focusing on the evidence, the instruction "improperly frames the issues in terms of which side presented the more compelling evidence." We disagree. "Quite to the contrary, the instruction is impartial. The instruction mandates that the jury 'not disregard the testimony of any witness without a reason or because of prejudice or a desire to favor one side or the other' but does not tell the jury to favor one side or the other. [Citation.] The instruction mandates that the jury 'decide what evidence, if any, to believe,' regardless of which side introduces the evidence, but does not tell the jury to disregard the prosecution's burden of proof or to decide the case on the basis of disbelief of defense witnesses or presentation of more compelling evidence by the prosecution than by the defense." (*People v. Ibarra, supra,* 156 Cal.App.4th at p. 1191, italics omitted; *People v. Anderson, supra,* 152 Cal.App.4th at p. 939; *People v. Felix, supra,* 160 Cal.App.4th at p. 858.)

Fourth, Hernandez argues the instruction improperly "directs the jury to choose between the government's witnesses and the defense witnesses," whereas in fact, a jury is not required to choose between the two sides but instead may conclude neither side is entirely correct. In a related contention, appellant complains that the instruction improperly suggests that the number of witnesses is a factor the jury may consider when deciding which of two conflicting versions of the evidence is correct. Appellant "misreads the instruction, which cautions the jury, 'What is important is whether the

testimony or any other evidence convinces you, not just the number of witnesses who testify about a certain point.' [Citation.] 'The instruction says nothing about choosing between prosecution and defense witnesses. It merely states the commonsense notion that the number of witnesses who have given testimony on a particular point is not the test for the truth of that point. It does no more. The jury remains free to choose the witness or witnesses it believes and what part of a witness's testimony it finds believable.' " (*People v. Ibarra, supra,* 156 Cal.App.4th at p. 1191, italics omitted; *People v. Anderson, supra,* 152 Cal.App.4th at p. 940; *People v. Felix, supra,* 160 Cal.App.4th at p. 858.)

b. *CALCRIM Nos. 223 and 226.*

Hernandez similarly asserts that both CALCRIM Nos. 226 and 223 are defective because both suggest the defense has a duty to present evidence or disprove the charge. In this regard, he finds objectionable CALCRIM No. 223's statement that both direct and circumstantial evidence are acceptable to "prove or disprove the elements of a charge," and CALCRIM No. 226's statement that, when evaluating witness credibility, jurors might consider whether "other evidence prove[d] or disprove[d] any fact about which the witness testified[.]"

Neither instruction suggests a defendant bears any burden of proof at trial. CALCRIM No. 223 accurately states that either direct or circumstantial evidence may disprove the elements of a charge. This statement does not implicitly or explicitly suggest the defendant has any burden of proof, especially when read in conjunction with the reasonable doubt instruction, CALCRIM No. 220. The same is true in regard to CALCRIM No. 226. The sole basis for Hernandez's challenge appears to be the instructions' use of the word "disprove." However, it is accurate that evidence – either presented by the People or by the defendant – can establish that an element of the charged crimes has not been met. Reasonable jurors would not make the logical leap from mere use of the word "disprove" to a conclusion that the defendant bears a burden of proof.

In sum, there was no instructional error.

3. *Correction of the abstract of judgment.*

At sentencing, the trial court imposed a term of 34 years, 4 months, plus life. Two days later, at a second hearing, the court imposed a corrected sentence of 35 years, plus life.[10] The abstract of judgment correctly reflects a one-year term on the section 12022, subdivision (a)(1) enhancement, but erroneously reflects a 34-year determinate term, rather than the 35-year term orally imposed by the court. Where an abstract of judgment differs from the court's oral pronouncements, the abstract does not control. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185; *People v. Walz* (2008) 160 Cal.App.4th 1364, 1367, fn. 3; *People v. Zackery* (2007) 147 Cal.App.4th 380, 385.) Thus, it is apparent that the abstract of judgment contains a clerical error, which may be corrected by this court on appeal. (*People v. Mitchell, supra*, at p. 185; *People v. Garcia* (2008) 162 Cal.App.4th 18, 24, fn. 1.) We order the judgment modified accordingly, as the People request.

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10 The sentence was configured as follows. On count 3, attempted murder (the base term), the court imposed the midterm sentence of seven years, doubled pursuant to the Three Strikes law, plus a consecutive 10-year term for the section 186.22 gang enhancement, plus a consecutive, 10-year term for the section 12022.53, subdivision (b) firearm enhancement, for a total of 34 years. On count 1 (attempt to dissuade a witness), the court imposed a consecutive term of life in prison, with a minimum parole eligibility date of 14 years, plus a consecutive one-year term for the section 12022, subdivision (a)(1) arming enhancement. Sentence on count 4, making a criminal threat, was stayed pursuant to section 654.

DISPOSITION

The abstract of judgment is modified to reflect a term of 35 years plus life. The clerk of the superior court is directed to prepare an amended abstract of judgment reflecting this modification, and forward a copy to the Department of Corrections. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.